

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT R. BERRY AND JILL
HUMPHREY,

Petitioners,

vs.

Case No. 13-1037RU

DEPARTMENT OF LAW ENFORCEMENT,

Respondent.

FINAL ORDER

An administrative hearing in this case was held on May 2, 2013, in Tallahassee, Florida, before Administrative Law Judge William F. Quattlebaum, Division of Administrative Hearings.

APPEARANCES

For Petitioners: Robert Ralph Berry, Esquire
Eisenmenger, Berry and Peters, P.A.
5450 Village Drive
Rockledge, Florida 32955

For Respondent: Ann Marie Johnson, Esquire
Department of Law Enforcement
2331 Phillips Road
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue in this case is whether a form created by the Florida Department of Law Enforcement's Alcohol Testing Program constitutes a "rule" as defined at section 120.52(16), Florida Statutes (2012).^{1/}

PRELIMINARY STATEMENT

On March 19, 2013, Robert R. Berry and Jill Humphrey (Petitioners) filed a Petition Challenging Agency Statement Defined as Rule. The Petitioners allege that a form used by the Florida Department of Law Enforcement (Respondent) meets the statutory definition of a "rule" and that the form should be subjected to the rulemaking process set forth at section 120.54.

On March 21, 2013, a Notice of Hearing was issued scheduling the administrative hearing for April 18, 2013. Based upon an Agreed Motion for Continuance filed on April 1, 2013, the hearing was rescheduled for May 2, 2013.

On April 29, 2013, the parties filed a Pre-Hearing Stipulation containing a Statement of Admitted Facts. The stipulated facts have been adopted and are incorporated herein, including the serial numbers of the breath test instruments currently registered for use in the State of Florida.

At the hearing, the Petitioners presented the testimony of one witness and had Exhibits numbered 1 through 10 admitted into evidence. The Respondent presented no testimony or exhibits.

The Transcript of the hearing was filed on May 20, 2013. Both parties filed proposed final orders that have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner Robert Berry is a licensed and active driver in the State of Florida who is subject to the "implied consent" provisions of section 316.1932, Florida Statutes.

2. Petitioner Jill Humphrey is a defendant in a criminal prosecution pending in Brevard County, Florida. Ms. Humphrey was arrested and charged by the State of Florida with driving with an unlawful breath alcohol level, after having submitted to an alcohol breath test pursuant to section 316.1932.

3. In addition to the charge of driving with an unlawful blood alcohol level, Ms. Humphrey is also being prosecuted under the theory that her breath alcohol test results were sufficient to create a presumption under section 316.1934 that she was driving under the influence of alcohol to the extent that her normal faculties were impaired.

4. The State of Florida has asserted that all applicable statutes and administrative rules were met related to the breath alcohol test administered to Ms. Humphrey and that the results of the test are admissible at trial.

5. Pursuant to section 316.1932(1)(a)2. and Florida Administrative Code Chapter 11D-8, the Alcohol Testing Program (ATP), a unit within the Respondent, is responsible for the operation, inspection and registration of the "Intoxilyzer 8000" breath testing instruments used for conducting breath alcohol

tests on drivers suspected of "driving under the influence" (DUI) in Florida.

6. Each instrument is subjected to an annual inspection performed by the ATP at its laboratory in Tallahassee, Florida. Local law enforcement agencies ship the instruments to Tallahassee for the annual inspection. Rule 11D-8.004 provides as follows:

Department Inspection and Registration of
Breath Test Instruments.

(1) The Department shall register and inspect a breath test instrument prior to such instrument being initially placed into evidentiary use by an agency. The inspection validates the instrument's approval for evidentiary use, and the registration denotes an instrument approved pursuant to these rules and shall reflect the registration date, the owner of the instrument, the instrument serial number, the manufacturer, and the model designation.

(2) Registered breath test instruments shall be inspected by the Department at least once each calendar year, and must be accessible to the Department for inspection. Any evidentiary breath test instrument returned from an authorized repair facility shall be inspected by the Department prior to being placed in evidentiary use. The inspection validates the instrument's approval for evidentiary use.

(3) Department inspections shall be conducted in accordance with Department Inspection Procedures FDLE/ATP Form 35 - Rev. August 2005 for the Intoxilyzer 5000 Series, or Department Inspection Procedures - Intoxilyzer 8000 FDLE/ATP Form 36 - Rev. August 2005 for the Intoxilyzer 8000; and the

results reported on FDLE/ATP Form 26 - Department Inspection Report--Rev. March 2004 for the Intoxilyzer 5000 Series, or FDLE/ATP Form 41 - Department Inspection Report - Intoxilyzer 8000 - Rev. August 2005 for the Intoxilyzer 8000.

(4) Department Inspectors shall be employed by the Department to register evidentiary breath test instruments, to conduct inspections and maintenance of breath test instruments and related equipment and facilities, to conduct and monitor training classes, and to otherwise ensure compliance with Chapter 11D-8, F.A.C. (emphasis added).

7. The inspection procedures applicable to the Intoxilyzer 8000 are set forth in FDLE/ATP Form 36, the "Department Inspection Procedures" form, and have been incorporated into the Florida Administrative Code by reference at rule 11D-8.017.

8. The ATP inspectors have used a variety of methods to document their observations of the instruments submitted for inspection, including individual notes generated by the inspectors.

9. In April 2012, the ATP created a form, called the "Instrument Processing Sheet," to organize and track the passage of each instrument through the inspection process.

10. The parties have stipulated that the Petitioners are substantially affected by the Instrument Processing Sheet form.

11. Although the Respondent does not require that the ATP inspectors use the Instrument Processing Sheet, inspectors uniformly use the form to document the receipt of the instruments

from local law enforcement agencies and their condition upon receipt.

12. The form prompts inspectors to visually review the physical condition of each instrument, including such items as the case, keyboard, handle, feet, "tight screws," and "dry gas holder."

13. Additionally, the form is used to guide inspectors through a review of the mechanical function of the instrument by a series of "quality checks" performed prior to the actual inspections. The checks are used to ascertain whether specified components within the instrument are in good working order and to document any related adjustments made to an instrument prior to the inspection.

14. An instrument that requires repair outside the expertise of the ATP is shipped to an authorized repair facility. Upon the return of an instrument to the ATP from a repair facility, the ATP performs a full inspection of the instrument before it is returned to a local agency. In November 2012, the form was revised to document shipment of an instrument to a repair facility.

15. The challenged form has not been adopted by rule. The Petitioners assert that the form constitutes a "rule" that must be subjected to statutory rulemaking requirements.

16. At the time of the hearing, the Respondent was preparing a digital version of the form that would permit the processing of each instrument to be tracked electronically.

17. One of the quality checks set forth on the form verifies the mechanical operation of the instrument's "flow sensor." A flow sensor monitors the passage of lung air through an instrument during a breath alcohol test and triggers an audible "tone" when the breath being generated by a test subject is sufficient to provide a scientifically reliable breath sample.

18. According to the form, an inspector should observe the instrument's ability to differentiate between airflow levels by conducting a series of specific air pressure tests. If the test results indicate that the sensor responds inaccurately, the sensor is calibrated to correct the response. The form prompts the inspector to record the initial test results, as well as post-calibration test results if calibration is required. The flow sensor may also be replaced to correct a defect.

19. After quality control checks have been completed, the ATP inspection is conducted according to the procedure set forth in FDLE/ATP Form 36. The results of the ATP inspection are reported on FDLE/ATP Form 41, the "Department Inspection Report - Intoxilyzer 8000" form, which is incorporated into the Florida Administrative Code by reference at rule 11D-8.017.

20. The Respondent is not required by statute or rule to record the specific results of a flow sensor test administered prior to the annual inspection.

21. The Respondent is required by FDLE/ATP Form 36 only to ascertain and report whether the instrument is able to distinguish adequate minimum sample volume from inadequate minimum sample volume.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.56, Fla. Stat.

23. As provided at section 120.56(4)(b), the Petitioners have the burden of establishing standing to bring this challenge, as well as to prove that the challenged statement constitutes a "rule" as defined at section 120.52(16). If the Petitioners meet their burden, the burden then shifts to the Respondent to prove that rulemaking to adopt the challenged statement as a rule is not practicable or feasible. Pursuant to section 120.57(1)(k), each party must meet its burden by a preponderance of the evidence.

24. The Petitioners have standing to bring this challenge to the Respondent's form, but the Petitioners have failed to establish that the challenged form is a "rule" and, accordingly, they have not met the burden.

25. Section 120.52(16) provides, in relevant part, the following definition:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

26. The evidence fails to establish that the challenged form "implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency." The evidence also fails to establish that the challenged form "imposes any requirement or solicits any information not specifically required by statute or by an existing rule."

27. Rule 11D-8.004 requires that the ATP perform an annual inspection of each alcohol breath test instrument and identifies the procedure that must be followed during the inspection as that set forth in FDLE/ATP Form 6.

28. The Instrument Processing Sheet is a form used to document the receipt by the Respondent of the instruments submitted by local agencies for inspection and to track the

instruments assessed by ATP inspectors. The form is also used to guide a series of quality checks performed to evaluate and restore the physical and mechanical condition of each instrument prior to the formal FDLE/ATP Form 36 inspection.

29. Not every step in the process must be the subject of codification. The assessment of an instrument's operational capacity prior to conducting an annual inspection is incidental to determining whether the instrument meets the criteria set forth on FDLE/ATP Form 36. In Wissel v. State, 691 So. 2d 507 (Fla. 2d DCA 1997), a Pinellas County defendant convicted of DUI following a jury trial, appealed the conviction on the grounds that the Respondent had not adopted rules governing the preparation of the stock alcohol solutions used to test the accuracy of the breath test instrument. The Second District Court held "that procedures that are implicit and incidental to procedures otherwise explicitly provided for in a properly adopted rule or regulation do not require further codification by a further adopted rule or regulation."

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by the Petitioners in this case pursuant to section 120.56(4)(b), Florida Statutes, and seeking a determination that the Respondent's Instrument Processing Sheet is a "rule" is hereby DISMISSED.

DONE AND ORDERED this 25th day of June, 2013, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 2013.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2012),
unless otherwise noted.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.